

EXHIBIT 1

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(Additional Counsel on Signature Page)

United States District Court
Southern District of New York

1:19-cv-10686-KPF

Ryan Cosgrove, Amanda Crout, individually
and on behalf of all others similarly
situated,

Plaintiffs,

- against -

Second Amended
Class Action Complaint

Oregon Chai, Inc.,

Defendant

Plaintiff

Plaintiffs by attorneys alleges upon information and belief, except for allegations pertaining to plaintiffs, which are based on personal knowledge:

1. Oregon Chai, Inc. (“defendant”) manufactures, distributes, markets, labels and sells powdered chai tea mix ~~packets purporting to be flavored by~~ with a purported primary characterizing flavor of vanilla, under the ~~ir~~ Oregon Chai brand Products (“Products”).
2. The Products ~~are~~is available to consumers from retail and online stores of third-parties and defendant's website and ~~and are~~is sold in ~~eat~~ins of ~~8.4~~10 OZ and boxes containing eight 1 OZ packets.
3. The front label includesof the ~~main flavor designation, “Vanilla~~ins and packets are identical except for the net weight and serving size.

4.—The relevant representations include “Oregon Chai,” “Vanilla and honey combine with premium black tea and chai spices” and “Made with Natural Ingredients.”²²



4. .

Tins



Packets



5. That the Tin and Packets are identical in composition is further shown through comparison of their Nutritional Facts and identical ingredient lists.

TinPackets

6. The differences in the exact numbers on the Nutrition Facts is because the serving size from the tin is 34 grams compared 28 grams for the packets.

6.7. Chai refers to a “type of drink, made originally in India, consisting of tea made with spices and usually with milk and sugar added.”¹

7.8. Chai is often flavored vanilla because the flavor from this tropical orchid helps to smooth out the spiciness and enhance the sweetness.

8.9. The Products ~~are misleading because (1) although labeled as “Vanilla,” they have less (or no) real vanilla than the label suggests and represents, (2) “Made they are flavored with Natural Ingredients” artificial vanillin, (3) they contain more honey and cinnamon than vanilla and (4) despite the representation they are that~~ gives reasonable consumers the impression that

¹ Cambridge Dictionary, [Chai](#), Definition.

all of the ingredients in ~~the Product~~ are natural, ~~when this is not truthful~~ they contain synthetic ingredients and artificial flavors.

I. Vanilla is Constantly Subject to Efforts at Imitation Due to High Demand

10. The tropical orchid of the genus *Vanilla* (*V. planifolia*) is the source of the prized flavor commonly known as vanilla, defined by law as “the total sapid and odoreous principles extractable from one-unit weight of vanilla beans.”²

11. Vanilla’s “desirable flavor attributes~~---~~... make it one of the most common ingredients used in the global marketplace, whether as a primary flavor, as a component of another flavor, or for its desirable aroma qualities.”³

12. Though the Pure Food and Drugs Act of 1906 (“Pure Food Act”) was enacted to “protect consumer health and prevent commercial fraud,” this was but one episode in the perpetual struggle against those who have sought profit through sale of imitation and lower quality commodities, dressed up as the genuine articles.⁴

13. It was evident that protecting consumers from fraudulent vanilla would be challenging, as E. M. Chace, Assistant Chief of the Foods Division of the U.S. Department of Agriculture’s Bureau of Chemistry, noted “There is at least three times as much vanilla consumed [in the United States] as all other flavors together.”⁵

14. This demand could not be met by natural sources of vanilla, leading manufacturers to devise clever, deceptive and dangerous methods to imitate vanilla’s flavor and appearance.

² 21 C.F.R. §169.3(c).

³ Daphna Havkin-Frenkel, F.C. Bellanger, Eds., *Handbook of Vanilla Science and Technology*, Wiley, 2018.

⁴ Berenstein, 412; some of the earliest recorded examples of food fraud include unscrupulous Roman merchants who sweetened wine with lead.

⁵ E.M. Chace, “The Manufacture of Flavoring Extracts,” *Yearbook of the United States Department of Agriculture* 1908 (Washington, DC: Government Printing Office, 1909) pp.333 –42, 333 quoted in [Nadia Berenstein, "Making a global sensation: Vanilla flavor, synthetic chemistry, and the meanings of purity," History of Science 54.4 \(2016\): 399–424 at 399.](#)

15. Today, headlines tell a story of a resurgent global threat of “food fraud” – from olive oil made from cottonseeds to the horsemeat scandal in the European Union.⁶

16. Though “food fraud” has no agreed-upon definition, its typologies encompass an ever-expanding, often overlapping range of techniques with one common goal: giving consumers less than what they bargained for.

A. Food Fraud as Applied to Vanilla

17. Vanilla is considered a “high-risk [for food fraud] product because of the multiple market impact factors such as natural disasters in the source regions, unstable production, wide variability of quality and value of vanilla flavorings,” second only to saffron in price.⁷

18. The efforts at imitating vanilla offers a lens to the types of food fraud regularly employed across the spectrum of valuable commodities in today’s interconnected world.⁸

Type of Food Fraud

Application to Vanilla

➤ Addition of markers

⁶ Jenny Eagle, ‘Today’s complex, fragmented, global food supply chains have led to an increase in food fraud’, [FoodNavigator.com](https://www.foodnavigator.com), Feb. 20, 2019; M. Dourado et al., Do we really know what’s in our plate?. *Annals of Medicine*, 51(sup1), 179-179 (May 2019); Aline Wisniewski et al., “How to tackle food fraud in official food control authorities in Germany.” *Journal of Consumer Protection and Food Safety*: 1-10. June 11, 2019.

⁷ Société Générale de Surveillance SA, (“SGS”), [Authenticity Testing of Vanilla Flavors – Alignment Between Source Material, Claims and Regulation](#), May 2019.

⁸ Kathleen Wybourn, DNV GL, Understanding Food Fraud and Mitigation Strategies, PowerPoint Presentation, Mar. 16, 2016.

- specifically tested for instead of natural component of vanilla beans
- Manipulation of the carbon isotope ratios to produce synthetic vanillin with similar carbon isotope composition to natural vanilla
- Appearance of *more* and/or higher quality of the valued ingredient
 - Ground vanilla beans and/or seeds to provide visual appeal as “specks” so consumer thinks the product contains real vanilla beans, when the ground beans have been exhausted of flavor
 - Caramel to darken the color of an imitation vanilla so it

- more closely resembles the hue of real vanilla⁹
- Annatto and turmeric extracts in dairy products purporting to be flavored with vanilla, which causes the color to better resemble the hue of rich, yellow butter
 - Tonka beans, though similar in appearance to vanilla beans, are banned from entry to the United States due to fraudulent use
 - Coumarin, a toxic phytochemical found in Tonka beans, added to imitation vanillas to increase vanilla flavor perception
- Substitution and replacement of a high quality ingredient with alternate ingredient of lower quality
- Synthetically produced ethyl vanillin, from recycled paper, tree bark or coal tar, to imitate taste of real vanilla
- Addition of less expensive substitute ingredient to mimic flavor of more valuable component
- “to mix flavor materials together at a special ratio in which they [sic] compliment each other to give the desirable aroma and taste”¹⁰
 - Combination with flavoring substances such as propenyl guaethol (“Vanitrope”), a “flavoring agent [, also] unconnected to vanilla beans or vanillin, but unmistakably producing the sensation of vanilla”¹¹
- Compounding, Diluting, Extending
- “Spiking” or “fortification” of vanilla through addition of natural and artificial flavors including vanillin, which simulates vanilla taste but obtained from tree bark

⁹ Renée Johnson, [“Food fraud and economically motivated adulteration of food and food ingredients.”](#) Congressional Research Service R43358, January 10, 2014.

¹⁰ Chee-Teck Tan, [“Physical Chemistry in Flavor Products Preparation: An Overview”](#) in Flavor Technology, ACS Symposium Series, Vol. 610 1995. 1-17.

¹¹ Berenstein, 423.

➤ Addition of fillers to give

the impression there is more of the product than there actually is

- Injection of vanilla beans with mercury, a poisonous substance, to raise the weight of vanilla beans, alleged in *International Flavors and Fragrances (IFF), Inc. v. Day Pitney LLP and Robert G. Rose*, 2005, Docket Number L4486-09, Superior Court of New Jersey, Middlesex County

- Subtle, yet deliberate misidentification and obfuscation of a product's components and qualities as they appear on the ingredient list¹²

➤ Ingredient List Deception¹²

- “ground vanilla beans”

gives impression it describes unexhausted vanilla beans when actually it is devoid of flavor and used for aesthetics

- “natural vanilla flavorings” – “-ing” as suffix referring to something *like* that which is described
- “Vanilla With Other Natural Flavors” – implying – wrongly – such a product has a sufficient amount of vanilla to characterize the food
- “Natural Flavors” – containing “natural vanillin” derived not from vanilla beans but from tree pulp. When paired with real vanilla, vanillin is required to be declared as an artificial flavor
- “Non-Characterizing” flavors which are not identical to vanilla, but that extend vanilla

19. The “plasticity of legal reasoning” with respect to food fraud epitomize what H.

Mansfield Robinson and Cecil H. Cribb noted in 1895 in the context of Victorian England:

¹² Recent example of this would be “evaporated cane juice” as a more healthful sounding term to consumers to identify sugar.

~~the most striking feature of the latter-day sophisticator of foods is his knowledge of~~ the law and his skill in evading it. If a legal limit on strength or quality be fixed for any substance (as in the case of spirits), he carefully brings his goods right down to it, and perhaps just so little below that no magistrate would convict him.

The law and chemistry of food and drugs. London: F.J. Rebman at p. 320.¹³

~~B. The Use of Vanillin to Simulate Vanilla~~

~~17. The most persistent challenger to the authenticity of real vanilla has been synthetic versions of its main flavor component, vanillin.~~

~~18. First synthesized from non-vanilla sources by German chemists in the mid-1800s, vanillin was the equivalent of steroids for vanilla flavor.~~

~~19. According to Skip Rosskam, a professor of vanilla at Penn State University and former head of the David Michael flavor house in Philadelphia, “one ounce of vanillin is equal to a full gallon of single-fold vanilla extract.”¹⁴~~

~~20. Today, only 1-2% of vanillin in commercial use is vanillin obtained from the vanilla plant, which means that almost all vanillin has no connection to the vanilla bean.~~

~~21. Nevertheless, disclosure of this powerful ingredient has always been required where a product purports to be flavored with vanilla. See Kansas State Board of Health, Bulletin, Vol. 7, 1911, p. 168 (cautioning consumers that flavor combinations such as “vanilla and vanillin...vanilla flavor compound,” etc., are not “vanilla [extract] no matter what claims, explanations or formulas are given on the label.”).~~

¹³ Cited in Sébastien Rioux, “Capitalist food production and the rise of legal adulteration: Regulating food standards in 19th-century Britain,” *Journal of Agrarian Change* 19.1 (2019) at p. 65 (64-81).

¹⁴ ~~Katy Severson, Imitation vs. Real Vanilla: Scientists Explain How Baking Affects Flavor, Huffington Post, May 21, 2019.~~

~~22. Since vanilla is the only flavor with its own standard of identity, its labeling is controlled not by the general flavor regulations but by the standards for vanilla ingredients.~~

~~23. This means that if a product is represented as being characterized by vanilla yet contains non-vanilla vanillin, the label and packaging must declare vanillin an artificial flavor. See Vanilla-vanillin extract at 21 C.F.R. § 169.180(b) (“The specified name of the food is ‘Vanilla-vanillin extract __-fold’ or ‘__-fold vanilla-vanillin extract’, followed immediately by the statement ‘contains vanillin, an artificial flavor (or flavoring)’.”); see also 21 C.F.R. § 169.181(b), § 169.182(b) (Vanilla-vanillin flavoring and Vanilla-vanillin powder).~~

~~24. This prevents consumers from being misled by products which may taste similar to real vanilla and but for consumer protection requirements, would be sold at the price of real vanilla.~~

C. Production of “Natural Vanillins” Combined with “Natural Vanilla”

~~25. The past ten years have seen many vanillins purporting to be a “natural flavor” derived from a natural source material which undergoes a natural production process.~~

~~26. However, “natural vanillin” is not a “natural vanilla flavor” because the raw material is not vanilla beans but ferulic acid and eugenol.~~

~~27. Ferulic acid can be converted to vanillin through a natural fermentation process which is cost prohibitive for almost all applications.~~

~~28. Vanillin from eugenol is easier to produce in a way claimed to be a “natural process.”~~

~~29. However, because this process occurs without transparency or verification in China, regulators and consumers are not told the production method is more properly described as that of an artificial flavor, involving a chain of chemical reactions.~~

II. Flavor Industry’s Efforts to Use Less Vanilla, Regardless of any Shortages

20. The “flavor industry” refers to the largest “flavor houses” such as Symrise AG, Firmenich, Givaudan, International Flavors and Fragrances (including David Michael), Frutarom and Takasago International along with the largest food manufacturing companies such as Unilever.

21. The recent global shortage of vanilla beans has provided the flavor industry another opportunity to “innovate[ing] natural vanilla solutions—...to protect our existing customers.”¹⁵

22. Their “customers” do not include the impoverished vanilla farmers nor consumers, who are sold products labeled as “vanilla” for the same or higher prices than when those products contained *only* vanilla.

23. These efforts include (1) market disruption and manipulation and (2) the development of alternatives to vanilla which completely or partially replace vanilla.

A. Flavor Industry’s Attempt Attempts to
Disrupt Supply of Vanilla to Create a “Permanent Shortage”

24. The flavor industry has developed schemes such as the “Sustainable Vanilla Initiative” and “Rainforest Alliance Certified,” to supposedly assure a significant supply of vanilla at stable, reasonable prices paid to the farmers.

25. ~~Contrary to their intention~~However, these programs make vanilla less “sustainable” by paying farmers to destroy their vanilla plants and ~~harvest~~produce palm oil under the pretense of “crop diversification.”

~~31. There have also been allegations that these programs use child and/or slave labor.~~

26. Other tactics ~~alleged to be utilized by these companies~~ include “phantom bidding,” where “deep-pocketed” saboteurs claim they will pay a higher price to small producers, only to

¹⁵ Amanda Del Buono, [Ingredient Spotlight](#), Beverage Industry, Oct. 3, 2016.

~~leave~~vanish, leaving the farmers ~~in the lurch,~~ forced to sell at bottom dollar to remaining bidders.¹⁶

27. The reasons for these counterintuitive actions is because ~~they benefit~~the flavor industry benefits from high vanilla prices and the use of less real vanilla.

28. When less vanilla is available, the customers of the flavor companies – food manufacturers – must purchase the higher margin, proprietary, “vanilla-like” flavorings made with advanced technology and synthetic biology.

B. Defendant’s Parent Company, Kerry plc, Promotes the Use of Imitation Vanilla ~~WONF~~ Ingredients to Real Vanilla

29. Though flavor companies will not admit their desire to move off real vanilla, this conclusion is consistent with the comments of industry executives.

30. According to Suzanne Johnson, vice president ~~or~~of research at a North Carolina laboratory, “Many companies are trying to switch to natural vanilla with other natural flavors [WONF] in order to keep a high-quality taste at a lower price,” known as “Vanilla WONF.”

31. In fact, the head of “taste solutions” at defendant’s parent company, Irish conglomerate Kerry plc, urged flavor manufacturers to “[G]et creative” and “build a compounded vanilla flavor with other natural flavors.”

32. A compounded vanilla flavor “that matches the taste of pure vanilla natural extracts” can supposedly “provide the same vanilla taste expectation while requiring a smaller quantity of vanilla beans. The result is ~~a~~ greater consistency in pricing, availability, and quality.”¹⁷

¹⁶ Monte Reel, [The Volatile Economics of Natural Vanilla in Madagascar](#), [Bloomberg.com](#), Dec. 16, 2019.

¹⁷ Donna Berry, [Understanding the limitations of natural flavors](#), [BakingBusiness.com](#), Jan. 16, 2018.

33. These compounded flavors exist in a “black box” with “as many as 100 or more flavor ingredients,” including “naturally produced vanillin,” potentiators and enhancers, like maltol and piperonal, blended together to enhance the vanilla, allowing the use of less vanilla to achieve the intended taste.¹⁸

34. The effort numerous “naturally produced vanillins” are just as potent as their synthetic predecessors, such that “one ounce of vanillin is equal to replace a full gallon of single-fold vanilla with so-called Vanilla WONE started extract.”¹⁹

34.35. Since only 1-2% of vanillin in commercial use is vanillin obtained from the late 1960s, but vanilla plant, which means that almost all vanillin has no connection to the last 10 years have seen the proliferation of this ingredient vanilla bean.

C. Decline of Industry Self-Governance

35.36. 46. That high-level executives in the flavor industry are willing to boast of their stratagems to give consumers less vanilla for the same or greater price is not unexpected.

36.37. The once powerful ~~and respected~~ trade group, The Flavor and Extract Manufacturers Association (“FEMA”), abandoned its “self-policing” of misleading vanilla labeling claims and disbanding its Vanilla Committee.

¹⁸ Hallagan and Drake, FEMA GRAS and U.S. Regulatory Authority: U.S. Flavor and Food Labeling Implications, Perfumer & Flavorist, Oct. 25, 2018; Charles Zapsalis et al., Food chemistry and nutritional biochemistry. Wiley, 1985, p. 611 (describing the flavor industry’s goal to develop vanilla compound flavors “That *Seem[s]* to be Authentic or at Least Derived from a Natural Source”) (emphasis added).

¹⁹ Katy Severson, Imitation vs. Real Vanilla: Scientists Explain How Baking Affects Flavor, Huffington Post, May 21, 2019.

~~47. FEMA previously opposed industry efforts to deceive consumers, but cast the public to the curb in pursuit of membership dues from its largest members, such as Unilever.~~

~~III. Designating Flavors~~Representations are Misleading Because They Misrepresent the Amount, Percentage and Type of Ingredients in the Products~~Represented as “Vanilla”~~

~~—— A. Front Label Designation of Flavors~~

~~48. Where a food makes any representations as to its primary flavor, it must be designated in a way which is truthful and not misleading based on various factors.~~

~~49. These include (1) the presence of “natural flavor” and/or “artificial flavor,” (2) whether the natural and artificial flavor simulates, resembles or reinforces the characterizing flavor, (3) whether the natural flavor is obtained from the food ingredient represented as the characterizing flavor—i.e., does the peach flavor come from real peaches or is it synthesized from apricots? and (4) the relative amounts of the different flavor types. See 21 C.F.R. § 101.22(i)(1)(i)–(iii), 21 C.F.R. § 101.22(i)(2).~~

~~50. “Natural flavor” refers to “the essential oil, oleoresin, essence or extractive...which contains the flavoring constituents” from a natural source such as plant material and can refer to combinations of natural flavors. See 21 C.F.R. § 101.22(a)(3).~~

~~51. “Artificial flavor” is any substance whose function is to impart flavor that is not derived from a natural source. See 21 C.F.R. § 101.22(a)(1).~~

~~52. ——— A product labeled “Vanilla ———” gives the impression that all the flavor (taste sensation and ingredient imparting same) in the product is contributed by the characterizing food ingredient of vanilla beans. See 21 C.F.R. § 101.22(i)(1) (describing a food which contains no simulating artificial flavor and not subject to 21 C.F.R. § 101.22(i)(1)(i)–(iii)).~~

~~54. The absence of the term “flavored” where a food is labeled “Vanilla” gives consumers the impression the food contains a sufficient vanilla to characterize the food.~~

~~55. If a product contains an “amount of characterizing ingredient [vanilla] insufficient to independently characterize the food,” it would be required to be labeled as “Vanilla flavored” or “natural vanilla flavored.” See 21 C.F.R. § 101.22(i)(1)(i).~~

~~56. Where a product contains a “characterizing flavor from the product whose flavor is simulated and other natural flavor which simulates, resembles or reinforces the characterizing flavor,” the front label would be required to state “with other natural flavor.” See 21 C.F.R. § 101.22(i)(1)(iii) (“the food shall be labeled in accordance with the introductory text and paragraph (i)(1)(i) of this section and the name of the food shall be immediately followed by the words “with other natural flavor”).~~

~~57. If the amount of the characterizing flavor is sufficient to independently characterize the food, the front label would state “[Name of Characterizing Flavor] With Other Natural Flavor.” See 21 C.F.R. § 101.22(i)(1)(iii); see also 21 C.F.R. § 101.22(i)(1) (“introductory text” describing scenario where food contains “no artificial flavor which simulates, resembles or reinforces the characterizing flavor,” and none of the sub-paragraphs of 21 C.F.R. § 101.22(i)(1) apply).~~

~~58. If the amount of the characterizing flavor is insufficient to independently characterize the food, the front label would be required to state “[Name of Characterizing Flavor] Flavored With Other Natural Flavor.” See 21 C.F.R. § 101.22(i)(1)(iii) referring to “paragraph (i)(1)(i) of this section,” 21 C.F.R. § 101.22(i)(1)(i).~~

~~59. Where an exclusively vanilla ingredient is used in a product, it is listed on the ingredient list by its common or usual name provided by its standard of identity. See 21 C.F.R. §~~

~~169.175(b)(1) (“The specified name of the food is ‘Vanilla extract’ or ‘Extract of vanilla.’”); see also 21 C.F.R. § 169.177(b) (“The specified name of the food is ‘Vanilla flavoring.’”).~~

~~60. — Where vanilla is part of a flavor added to a food, it is labeled “natural flavor.”~~

~~IV. — Analysis by Gas Chromatography Mass Spectrometry Reveals the Absence or Non-Detection of Real Vanilla~~

~~61. — The Product makes direct and indirect representations as to its “primary recognizable flavor(s), by word, vignette, e.g., depiction of a fruit, or other means.” See 21 C.F.R. § 101.22(i).~~

~~62. — The Product’s primary recognizable flavors include vanilla, honey, cinnamon and chai spices.~~

~~37.17. — Where a product’s front label states “Vanilla,” “chai spices” and displays cinnamon cloves, yet none of these ingredients are separately designated on the ingredient list, it is because vanilla, cinnamon and chai spices are part of the “Natural Flavors” ingredient. See 21 C.F.R. § 101.22(h)(1) (“Spice, natural flavor, and artificial flavor may be declared as ‘spice’, ‘natural flavor’, or ‘artificial flavor’, or any combination thereof, as the case may be.”).~~

38. A food is considered misbranded if “its labeling is false or misleading in any particular.” 21 U.S.C. § 343(a).

39. A food label contains numerous pieces of information including a (1) statement of identity and/or common or usual name, (2) flavor designation and (3) ingredient list.

A. Representations Are Misleading Because Product Contains More Honey than Vanilla

40. A “statement of identity” is a “common or usual name” or an “appropriately descriptive term.” See 21 C.F.R. § 101.3(b)(2)-(3).

41. The Product is identified as “Vanilla and honey combine with premium black tea and chai spices.” 21 C.F.R. § 102.5(a) (requiring common or usual name to “accurately identify or describe, in as simple and direct terms as possible, the basic nature of the food or its characterizing properties or ingredients.”).

42. The Product’s common or usual name gives the impression that vanilla is present in an amount greater than the honey and chai spices because “Vanilla” is in the largest font above the statement of identity and highlighted on front label and vanilla is listed first in the statement of identity.

43. The Product’s labeling and appearance creates “an erroneous impression that such ingredient(s) or component(s) [vanilla] is present in an amount greater than is actually the case.” 21 C.F.R. § 102.5(b).

44. The Product’s common or usual name fails to reveal there is more honey than vanilla, indicated on the ingredient list:



INGREDIENTS: SUGAR, DRIED WHOLE MILK, DRIED NONFAT MILK, DRIED HONEY, TAPIOCA MALTODEXTRIN, INSTANT BLACK TEA, MALTODEXTRIN, SALT, NATURAL FLAVORS.

INGREDIENTS: SUGAR, DRIED WHOLE MILK, DRIED NONFAT MILK, DRIED HONEY, TAPIOCA MALTODEXTRIN, INSTANT BLACK TEA, MALTODEXTRIN, SALT, NATURAL FLAVORS.
“

~~38.45.~~

“Dried

Honey” is indicated ~~in the Product through the designation of “dried honey” which~~
~~is~~ as the fourth most predominant ingredient by weight, ahead of “Natural Flavors.” 21 C.F.R.
 § 101.4(a)(1) (requiring ingredients “be listed by common or usual name in descending order of
 predominance by weight on either the principal display panel or the information panel”).

46. The Product’s ingredient list does not identify vanilla, chai spices or cinnamon,
which means these components are part of the “Natural Flavors” ingredient. See 21 C.F.R. §
101.22(h)(1) (“Spice, natural flavor, and artificial flavor may be declared as ‘spice’, ‘natural
flavor’, or ‘artificial flavor’, or any combination thereof, as the case may be.”).

~~The front label of the Product is required to be labeled consistent with~~ B. GC-MS
Analysis Determines the Flavor Composition and Representations are Inconsistent

~~65. — Because the flavor regulations in 21 C.F.R. §101.22.~~

~~39.47.~~

By not

~~including any qualifying terms after “vanilla” such as “flavored” or “other natural~~
~~flavors~~ components are part of the “Natural Flavor,” consumers ~~will expect the Product contains~~
~~actual vanilla from the vanilla bean,~~ are unable to confirm that vanilla is ~~one of~~ the characterizing
~~flavors, the amount of vanilla is sufficient to flavor the Product, no other flavors simulate,~~
~~resemble, reinforce, enhance or extend the flavoring from vanilla compared to “chai spices” or~~
~~cinnamon.~~

~~66. — Gas chromatography mass spectrometry (“GC MS”) is “the analysis method of~~
~~choice for smaller and volatile molecules such as benzenes, alcohols and aromatics.”²⁰~~

²⁰ ~~ThermoFisher Scientific, Gas Chromatography Mass Spectrometry (GC/MS) Information.~~

40.48. _____ GC-MS ~~is~~
 able to “~~separate~~separates complex mixtures [, and] ~~to quantify analytes.~~” quantifies aromatics,
and determine what compounds are present in the greatest amount and percentage.²¹

41.49. _____ Beginning
 with the gas chromatograph, ~~the (“GC”), a~~ sample is vaporized ~~(the gas phase)~~ and separated
 into its components by a capillary column ~~“packed with a stationary (solid) phase.”.~~

42.50. _____ The
 compounds are “propelled by an inert carrier gas such as argon, helium or nitrogen” where they
 separate from each other and “elute from the column at different times, which is generally
 referred to as their retention times.”

43.51. _____ After the
 components exit the GC column, “they are ionized by the mass spectrometer using electron or
 chemical ionization sources.”

67.—~~The~~ ionized molecules ~~get~~are accelerated through ~~the~~a mass analyzer, ~~which is~~
~~typically a quadrupole or ion trap.~~

68.—~~Then the “ions are— and~~ separated based on their ~~different~~unique mass-to-charge
 (m/z) ~~ratios.”~~

44.52. _____ ~~The last~~
~~steps “involve ion detection and analysis, with compound peaks appearing as a function~~ratios,
the equivalent of ~~their m/z ratios, with peak heights “proportional to the quantity of the~~
~~corresponding compounds~~ “flavor fingerprint.”

²¹ ThermoFisher Scientific, Gas Chromatography Mass Spectrometry (GC/MS) Information.

~~53. A complex sample will generate “several different peaks, and the final readout will be The m/z ratios are compared for a match against databases containing all known flavor compounds.”²²~~

~~45.54. _____ The result is a mass spectrum” which plots or chromatogram, a graph showing the elution times on the X-axis and the amount or intensity of the compounds on the Y-axis.~~

~~74. Computer databases of mass spectra are used, like a DNA database, to match the detected compounds based on their m/z ratio.²³~~

~~75. GC MS can detect the presence of the four compounds generally considered markers for the presence of real vanilla, which are present in the following consistent amounts:~~

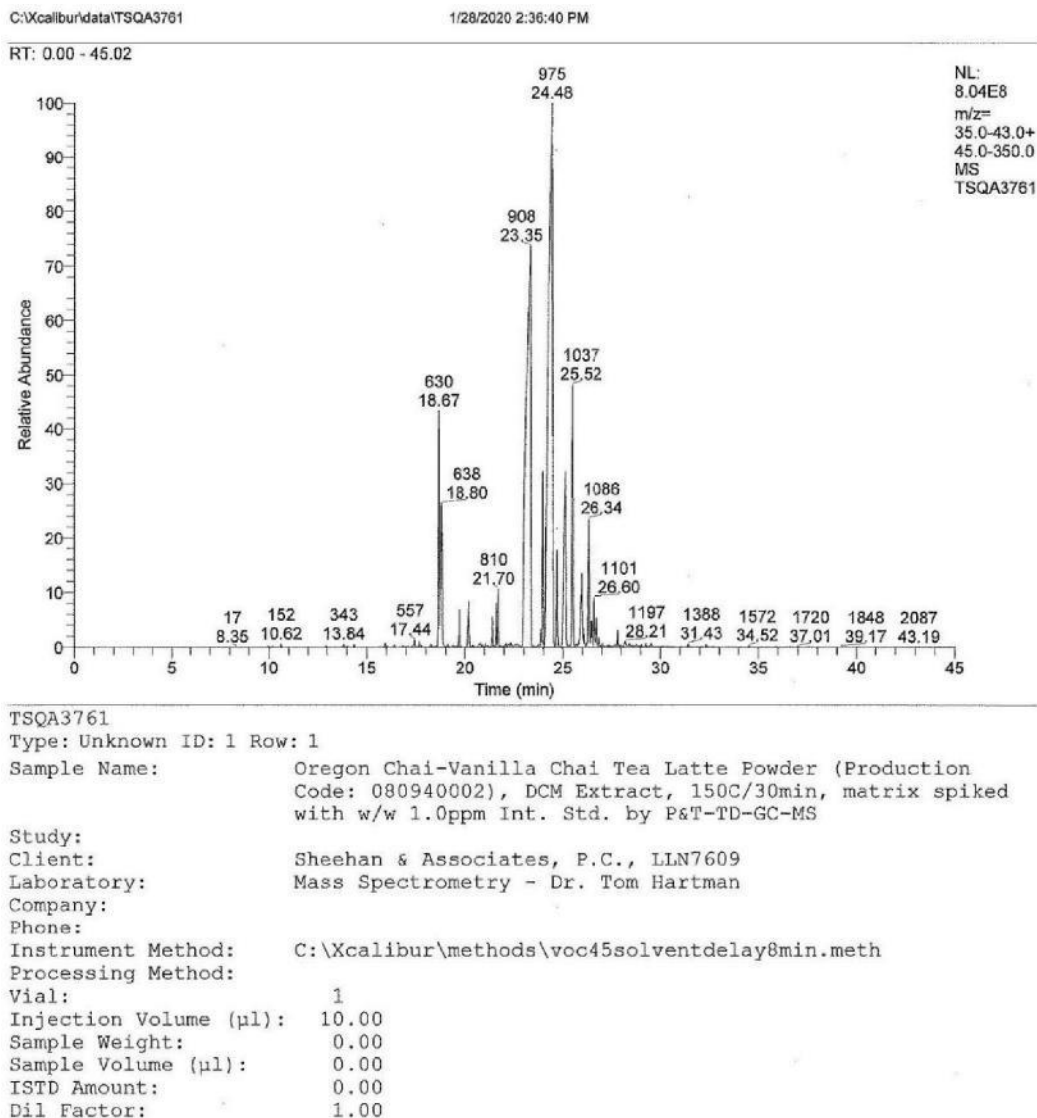
Compounds	Percent Present in Vanilla Beans
vanillin	1.3-1.7 %
p-hydroxybenzaldehyde	0.1%
vanillic acid	0.05%
p-hydroxybenzoic acid	0.03%

~~46.17. _____ The Product was subjected to GC-MS analysis which generated the below chromatogram and peak assignment table. Exhibit A, GC-MS Report, January 31, 2020.~~

~~Vanilla Chai Chromatogram p. 6~~

²² Id.

²³ Id.



80. —The peak assignment table identified the flavor compounds by matching their m/z ratio with a computer database of virtually all known compounds.

Peak Assignment Table—p. 5

Table 1

Sheehan & Associates, P.C., Project #7609
Oregon Chai-Vanilla Chai-Tea Latte Powder
Production Code: 080940002
Methylene-Chloride Extract of with 1 ppm Matrix-Spiked Int. Std. by P&T-TD-GC-MS

Data File = TSQ43761

47.55. _____ The relative

amounts of the detected compounds are indicated in columns two (Area Integration) and four
(concentration parts per million or "Conc. PPM w/w.") of Table 1.

56. When applied to the Products, GC-MS reveals the abundance of cinnamon flavor
yet a trace, if any, of real vanilla. Exhibit A, GC-MS Report, January 31, 2020.

Peak Assignment Table p. 5

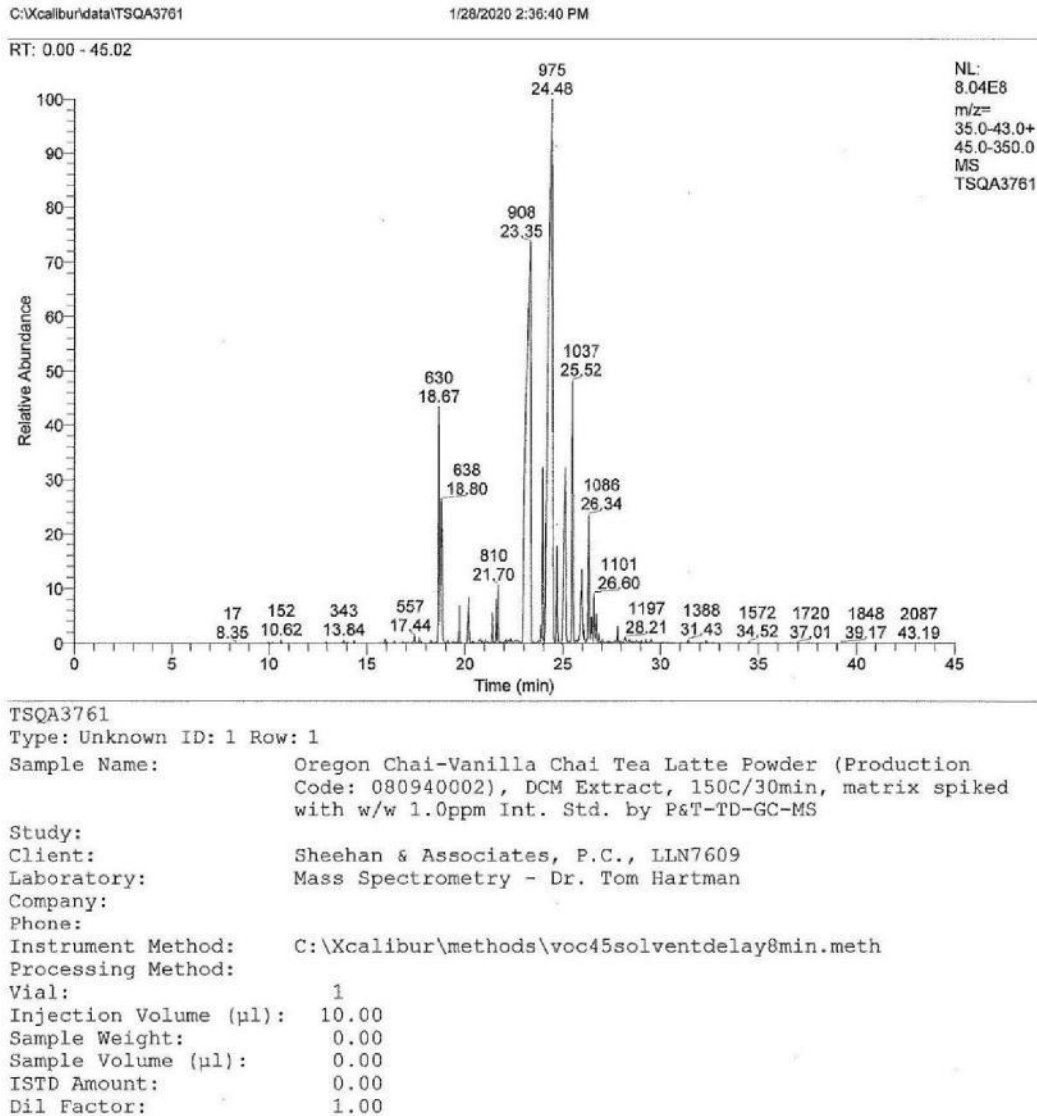
Table 1

Sheehan & Associates, P.C., Project #7609
Oregon Chai-Vanilla Chai Tea Latte Powder
Production Code: 080940002

Methylene Chloride Extract of with 1 ppm Matrix-Spiked Int. Std. by P&T-TD-GC-MS

Data File = TSQA3761

MS Scan #	Area Integration	Peak Assignment	Conc. PPM w/w
128	72979	diacetyl	0.03
320	47766	butyric acid	0.02
338	38326	hexanal	0.01
433	27923	pentanoic acid	0.01
521	62554	alpha-pinene	0.02
537	66939	sabinene	0.02
557	695994	hexanoic acid + benzaldehyde	0.24
565	46036	6-methyl-5-hepten-2-one	0.02
571	205613	myrcene	0.07
577	69669	beta-pinene	0.02
587	40228	octanal	0.01
602	59100	phellandrene	0.02
607	151444	alpha-terpinene	0.05
613	76140	2-carene	0.03
622	76381	p-cymene	0.03
630	12774499	limonene	4.45
638	14147018	benzyl alcohol	4.92
656	190521	2-hydroxybenzaldehyde + gamma-terpinene	0.07
678	59982	phenylmethyl formate	0.02
688	181675	terpinolene	0.06
693	2055563	linalool	0.72
721	4714233	maltol	1.64
734	181833	2-cyclohexen-1-ol, 1-methyl-4-(1-methylethyl)	0.06
744	31638	limonene oxide	0.01
756	561724	octanoic acid	0.20
761	201075	benzyl acetate	0.07
771	187033	benzene propanal	0.07
777	192043	benzoic acid	0.07
793	1573466	4-terpineol	0.55
805	2108650	alpha-terpineol	0.73
810	2872727	naphthalene-d8 (internal standard)	1.00
835	162060	linalyl acetate	0.06
843	215384	nerol	0.07
849	200704	2-methoxybenzaldehyde	0.07
853	92107	carvone	0.03
863	192007	nonanoic acid	0.07
909	159703856	cinnamic aldehyde	55.59
939	910471	delta-elemene + alpha-terpineol acetate	0.32
975	184660143	eugenol	64.28
988	6738967	eugenyl methyl ether	2.35
992	521400	elemene	0.18
1015	30865726	vanillin	10.74
1027	119802	? sesquiterpene	0.04
1037	25387074	caryophyllene	8.84
1054	9588671	dihydrocoumarin	3.34
1068	1357977	curcumene	0.47
1086	12538585	eugenyl acetate	4.36
1092	1193079	eremophyllene	0.42
1095	1176417	cadinene	0.41
1101	3293682	delta-cadinene	1.15
1110	1906777	2-methoxycinnamic aldehyde	0.66
1174	920785	caryophyllene oxide	0.32
1117-1306	4674870	complex mixture of sesquiterpenes, sesquiterpene alcohols & sesquiterpene oxides	1.83
1311	63761	benzyl benzoate	0.02
1388	281463	caffeine	0.10
Total			169.76

Chromatogram – p. 6C. Representations are Misleading Because Cinnamon is Present in Greater Amount than Vanilla

~~82.~~—The most concentrated compounds, ~~corresponding to the highest peaks were from~~ were eugenol (MS Scan # 975, 64.8 PPM) and cinnamic aldehyde (MS Scan # 909, 55.59 PPM).

~~48.57.~~ Eugenol and cinnamic aldehyde are most commonly obtained from cinnamon.

~~49.~~58. ~~The presence~~High levels of eugenol and cinnamic aldehyde ~~in large amounts was expected given the~~
~~is not unsurprising based on the front label~~ picture of cinnamon cloves and reference to ~~"chai~~
~~spices"~~on the front label."

59. ~~With respect to Of~~ the ~~above identified~~ four vanilla marker compounds, ~~the~~
~~Product only contains~~ vanillin was detected at 10.74 PPM (MS Scan # 1015) at 10.74 PPM.

60. Consumers are misled because the Product contains more cinnamon than vanilla,
even though the third highest concentration among front label designates the flavor primary
characterizing flavor as "VANILLA" and lists "vanilla" ahead of "chai spices" in the statement
of identity, causing them to reasonably expect the Products contain more vanilla than cinnamon.

61. Consumers, including plaintiffs, are not capable of knowing the proportion of
cinnamon and vanilla in the "Natural Flavor" ingredient by looking at the ingredient list.

D. Products' Vanilla Taste Provided by Artificial Vanillin

62. The Products' characterizing flavor is "Vanilla," as this term appears in the largest
font on the principal display panel and highlighted. See 21 C.F.R. § 101.22(i)(1) ("If the food
contains no artificial flavor which simulates, resembles or reinforces the characterizing flavor,
the name of the food on the principal display panel or panels of the label shall be accompanied
by the common or usual name of the characterizing flavor, e.g., "vanilla", in letters not less than
one-half the height of the letters used in the name of the food, except that...").

63. Consumers expect the Products to contain enough actual vanilla from vanilla
beans to provide a vanilla taste without other flavors that simulate, resemble, reinforce, enhance
or extend the flavoring from vanilla. See 21 C.F.R. § 169.3(b)(1); 21 C.F.R. §§ 169.175-169.182
(standards of identity for vanilla products).

~~50.64.~~

GC-MS can

detect the four marker compounds detected used to authenticate vanilla:

<u>Compounds</u>	<u>Percent Present in Vanilla Beans</u>
<u>vanillin</u>	<u>1.3-1.7 %</u>
<u>p-hydroxybenzaldehyde</u>	<u>0.1%</u>
<u>vanillic acid</u>	<u>0.05%</u>
<u>p-hydroxybenzoic acid</u>	<u>0.03%</u>

65. The only vanilla marker compound detected was vanillin, at 10.74 PPM (MS Scan # 1015) (Table 1).

~~51.66.~~ Because vanillin has the same chemical profile whether obtained from vanilla beans or produced synthetically, the absence of p-hydroxybenzaldehyde, p-hydroxybenzoic acid and vanillic acid is significant a molecular indicator that what tastes like vanilla is not from vanilla beans.

~~83.— However, most vanillin used in food to simulate vanilla is not obtained from vanilla beans but from artificial processes which convert natural source materials to vanillin.~~

~~84.— In samples which contain vanilla from the vanilla bean, the relative amounts of the four marker compounds are an indicator of whether the vanilla flavor is derived from real vanilla or merely compounds designed to imitate and simulate vanilla.~~

~~85.— For instance, the ratio of vanillin to p-hydroxybenzaldehyde is roughly fifteen to one (15:1) in a sample of authentic vanilla derived from vanilla beans.~~

~~86.— Where a product or sample contains relative amounts of these compounds which deviate significantly from this ratio, it is a molecular indicator that what tastes like vanilla to plaintiff and consumers is actually not from vanilla.~~

87. ~~Given the total absence of the non-vanillin marker compounds and the high level of vanillin, the logical conclusion is that if real vanilla is used, it is in trace or *de minimis* amounts not~~ Though the amount of real vanilla is non-detectable by advanced scientific means.

92. ~~Non-vanilla vanillin is typically added to flavors containing a drop of real vanilla to “fortify” or “spike” a vanilla taste.~~

52.67. ~~Though the amount of real vanilla may be non-detectable,~~ it is likely present at some point in a nominal amount far enough back in the supply chain so that defendant can make a literally truthful credibly and truthfully claim—, “Yes, the Products “contains vanilla” or is “made with vanilla.” (extract).”

53.68. However, the Product’s front label does not state “contains some vanilla” or “made with a drop of vanilla,” extract,” but rather, designates the characterizing flavor as “Vanilla” beneath “Chai Tea Latte” and above the more specific description, “Vanilla and honey combine with premium black tea and chai spices.” without qualifying terms.

69. ~~The Product is commonly expected to contain~~ Since the characterizing food vanilla ingredient is “hidden” as part of vanilla, based on the unqualified “natural flavors” and the label promotes vanilla over other flavors, consumers and plaintiffs are unable to compare how much vanilla is in the Products compared to other flavor components.

70. Consumers and plaintiffs are thus misled because the actual amount of vanilla is less than other flavors like cinnamon, despite representations to the contrary.

E. Products' Vanilla Taste is Supplied by Vanillin, an Artificial Flavor

71. Reasonable consumers are misled because the Products' vanilla taste is not supplied by vanilla but by artificial vanillin.

72. The high level of vanillin detected, without the other marker compounds is consistent with industry practice where vanillin is added to a drop of real vanilla to "fortify" or "spike" a vanilla taste.

73. Even if the vanillin component of the "Natural Flavors" qualifies as vanillin from a natural source and made through a natural process, the inclusion of vanillin with vanilla extract is prohibited and deceives consumers.

74. This is because the "standards of identity for vanilla extract (21 CFR 169.175) and vanilla flavoring (21 CFR 169.177) do not provide for the use of "vanilla" on the vanillin," such that even "natural vanillin" may not "be used to make natural vanilla flavors." Exhibit B, FDA Letter, Ferre- Hockensmith to Richard Brownell, Jr., April 19, 2005, pp. 1-2; see 21 C.F.R. § 169.175(a)(1)-(5) (listing glycerin, propylene glycol, sugar, dextrose and corn sirup as only optional ingredients for vanilla extract).

54-75. The Products' front label is misleading because "Vanilla," without more, implies the Product's flavor "is a 'natural vanilla flavor' even though naturally produced vanillin "is not derived from vanilla beans. Exhibit C, FDA Letter, Ferre-Hockensmith to Richard Brownell, Jr., August 5, 2008, p. 2.

93. While only defendant's flavor supplier~~When vanillin is in possession of the flavor formula used and can disclose same~~added to plaintiff and the Court, Whether the Product should be labeled pursuant to 21 C.F.R. § 101.22(i)(1)(i), § 101.22(i)(1)(ii) or § 101.22(i)(1)(iii) cannot be precisely known until defendant's flavor supplier, who is in exclusive possession of the flavor formula, provides a sample to plaintiff in expedited discovery, for laboratory analysis.

99. Though plaintiff does not have the flavor sample used, the GC-MS analysis, the flavoring regulations and defendant's clear violation of the regulations provide support for the

~~central contention that the Product's label deceives consumers to expect it contains more flavor containing vanilla than it actually does.~~

~~100. The Product's label violates the flavor declaration requirements because it either contains "an amount of characterizing extract, the ingredient insufficient to independently characterize the food, or the food contains no such ingredient." list say "contains vanillin, an artificial flavor (or flavoring)." See Vanilla-vanillin extract at 21 C.F.R. § 101.22(i)(1)(i) (instructing that "the 169.180(b) ("The specified name of the characterizing flavor may be food is 'Vanilla-vanillin extract -fold' or ' -fold vanilla-vanillin extract', followed immediately preceded by the word 'natural' and shall be immediately followed by the word 'flavored'").~~

~~55-76. The Product's label does not say "vanilla flavored chai" statement 'contains vanillin, an artificial flavor (or "natural vanilla flavored chai," which is misleading to consumers and in violation of 21 C.F.R. § 101.22(i)(1)(i)-flavoring').")~~

~~77. "Vanillin made through a natural process" may be designated "'vanillin' or 'natural flavor' but it should not be done in a way to imply that it is a 'natural vanilla flavor' because it is not derived from vanilla beans." Exhibit D, FDA Letter, Negash Belay to Agneta Weisz, October 10, 2008; Exhibit C, FDA Letter, Ferre-Hockensmith to Richard Brownell, Jr., August 5, 2008, p. 2 (allowing vanillin to be labeled as a "natural flavor" only outside the context of the standardized vanilla ingredients "under sections 169.180, 169.181, and 169.182 in 21 CFR.").~~

~~56-78. A plain reading of the flavor regulations coupled with the complete absence of non- vanillin marker compounds would require the Product~~s~~ be designated as "artificially flavored." See 21 C.F.R. § 101.22(i)(1)(ii) ("If none of the natural flavor used in the food is derived from the product whose flavor is simulated, the food in which the flavor is used shall be~~

labeled either with the flavor of the product from which the flavor is derived or as ‘artificially flavored.’”).”

101. Assuming the Product contains a drop of real vanilla, the front label of “Vanilla” and “Vanilla and honey combine with premium black tea and chai spices” is still misleading because (1) vanilla is not followed by the term “flavored” and (2) the label fails to disclose the presence of “other natural flavor which simulates, resembles or reinforces the characterizing flavor” of vanilla. See 21 C.F.R. § 101.22(i)(1)(iii).

102. Plaintiff’s support for the front label to declare the presence of “other natural flavor” is based in part on the detection of maltol (MS Scan # 721), 1.64 PPM.

103. Maltol is a flavor enhancer and synthetic flavoring substance which does not “contribute a flavor of its own” but is used to enhance and substitute for real vanilla, by increasing the sweetness of a food or beverage.²⁴

VIV. “Made with Natural Ingredients” is Deceptive and Misleading

57.79. The front label claim “Made with Natural Ingredients” gives plaintiff^s and consumers the impression that all the ingredients in the Product are natural.

Front Label This statement

²⁴ 21 C.F.R. § 172.515(b) (“Synthetic flavoring substances and adjuvants.”); Maltol, UL Prospector, Bryan W. Nash & Sons Ltd.1. Linalool’s concentration at 0.72 PPM exceeds more than half of the compounds detected by the GC-MS analysis, revealing its importance to the overall composition of the Product.



58.80. In the context of the “vanilla” representations, “Made with Natural Ingredients” is false, deceptive and misleading with respect to the “vanilla” claims because it gives plaintiffs and consumers the impression that the vanilla flavor in the Product is from natural vanilla —the vanilla bean beans and not artificial vanillin.

59.81. The GC-MS analysis reveals that while the Product may have vanilla taste, this is not from vanilla but from added vanillin, made from sources such as wood pulp, clove oil and coal tar.

82. This statement is false, deceptive and misleading with respect to In the context of vanilla ingredients, vanillin has never been considered a “natural” ingredient.

83. When vanillin is used with real vanilla, it is required to be labeled an artificial ingredient. See Vanilla-vanillin extract at 21 C.F.R. § 169.180(b) (“The specified name of the food is ‘Vanilla-vanillin extract -fold’ or ‘-fold vanilla-vanillin extract’, followed immediately by the statement ‘contains vanillin, an artificial flavor (or flavoring)’.”) (emphasis added).

~~60-84. In the context of~~ the non-vanilla representations ~~because no definition of "natural"~~
~~ever considered by the, the~~ FDA countenanced interprets "natural" to mean "that substances like
maltol, limonene (MS Scan # 630), 4.45 PPM or linalool (MS Scan # 693), 0.72 PPM, nothing
artificial or synthetic (including all color additives regardless of source) has been included in, or
has been added to, a food that would ~~be encompassed by this term, not normally be expected to~~
~~be in that food."~~²⁵ See 80 Fed. Reg. 69905, "Use of the Term "Natural" in the Labeling of
Human Food Products; Request for Information and Comments," Nov. 12, 2015 (stating FDA
 would maintain its policy "not to restrict the use of the term "natural" except for added color,
synthetic substances, and flavors.").

85. Given the importance of "Made with Natural Ingredients" is false, deceptive and
misleading because the Products contain synthetic ingredients including maltol to creating (MS
Scan # 721), 1.64 PPM, limonene (MS Scan # 630), 4.45 PPM and linalool (MS Scan # 693),
0.72 PPM.

86. The FDA lists maltol as an ingredient in the section "Synthetic flavoring substances
and adjuvants." See 21 C.F.R. § 172.515(b) ("Synthetic flavoring substances and adjuvants.").

87. Maltol is a vanilla flavor in the Product considering it appears to have little to no
vanilla, and that maltol is designated a enhancer and synthetic flavoring substance, no which does
not "contribute a flavor of its own" but is used to enhance and substitute for real vanilla, by
increasing the sweetness of a food or beverage."²⁶

88. The FDA lists limonene and linalool as ingredients in the section "Synthetic
flavoring substances and adjuvants." See 21 C.F.R. § 182.60.

²⁵ Use of the Term Natural on Food Labeling.

²⁶ 21 C.F.R. § 172.515(b) ("Synthetic flavoring substances and adjuvants."); Maltol, UL Prospector, Bryan W. Nash & Sons Ltd.1. Linalool's concentration at 0.72 PPM exceeds more than half of the compounds detected by the GC-MS analysis, revealing its importance to the overall composition of the Product.

89. Given the presence of the synthetic ingredients — vanillin, maltol, limonene and linalool — defendant's representation that the Products are "Made with Natural Ingredients" is deceptive and misleading.

61-90. Surveys and other market research, including expert testimony plaintiffs intend to introduce, will demonstrate that the term "natural" is misleading to a reasonable consumer ~~would~~ expect such an integral component of the Product to be synthetic as maltol is. See 21 C.F.R. § 172.515(b) ("Synthetic flavoring substances and adjuvants.") because the reasonable consumer believes the term "natural," when used to describe foods such as defendant's Vanilla Chai Products, means that it is free of synthetic ingredients.

~~105. — Further, no reasonable consumer would expect limonene or linalool to be present even in trace amounts in a food which promoted itself as being "Made with Natural Ingredients" because these components are known to be associated with negative health effects and used in insecticides.~~

~~111. Limonene has been found to cause kidney toxicity and tumors while linalool is allegedly used as an ingredient "in cockroach insecticide."~~

91. ~~The concentration of~~ A reasonable consumer's understanding of the term "Made with Natural Ingredients" comports with that of federal regulators and common meaning.

92. That is, the reasonable consumer understands the representation that a product is "Made with Natural Ingredients" to mean that it does not contain any synthetic or artificial ingredients.

93. Consumers lack the meaningful ability to test or independently ascertain or verify whether a product is "Made with Natural Ingredients," especially at the point of sale.

94. Consumers would not know the true nature of the ingredients merely by reading the ingredient's labels.

95. Discovering that the ingredients in the Vanilla Chai Products do not contain "Natural Ingredients" and are synthetic requires scientific investigation and knowledge of chemistry beyond the average consumer.

96. This difficulty is increased because the synthetic ingredients — vanillin, maltol, limonene and linalool is — are not de minimis, as even listed on the label because they are present part of the "Natural Flavor."

97. Moreover, the reasonable consumer is not expected or required to scour the ingredients list on the back of the Products in amounts exceeding half of the compounds detected, revealing their importance to the overall composition of the Product, order to confirm or debunk defendant's prominent front-of-pack claim, representation, and warranty that the Products are "Made with Natural Ingredients."

98. VI. The material misrepresentation that the Products are "Made with Natural Ingredients" induced consumers, including plaintiffs and class members, to pay a premium to purchase the Products.

99. Even accepting the argument that "natural flavor" is an accurate designation of the flavor ingredient, it is misleading to represent the Products as "Made With Natural Ingredients" because "natural flavor" is not identical to "natural" as interpreted by the FDA. See 21 C.F.R. § 101.22(a)(3) ("natural flavor or natural flavoring means the essential oil, oleoresin, essence or extractive, protein hydrolysate, distillate, or any product of roasting, heating or enzymolysis, which contains the flavoring constituents derived from a spice, fruit or fruit juice, vegetable or vegetable juice, edible yeast, herb, bark, bud, root, leaf or similar plant material, meat, seafood,

poultry, eggs, dairy products, or fermentation products thereof, whose significant function in food is flavoring rather than nutritional.").

V. Conclusion

100. Defendant's Whether or not a food's flavor is from the characterizing food ingredient, a flavor derived from the characterizing ingredient, a natural source unrelated to the characterizing flavor or an artificial source is material to consumers who expect a label to be truthful and not misleading.

101. Consumers seek to buy vanilla products where the vanilla flavor is only provided from vanilla beans, and avoid artificial flavors and flavors from sources other than the natural source material of a flavor for reasons including nutrition, health and/or the avoidance of chemicals and highly processed ingredients.

~~63.~~102. Defendant's branding and packaging of the Products are designed to ~~—~~ and does ~~—~~ deceive, mislead, and defraud consumers and defrauded plaintiffs.

~~64.~~103. Defendant ~~has~~ sold more of the Products and at higher prices ~~per unit~~ than it would have in the absence of this misconduct, resulting in additional profits at the expense of consumers like plaintiffs Cosgrove and Crout.

~~112. The amount and proportion of the characterizing component, vanilla, has a material bearing on price or consumer acceptance of the Products because consumers are willing to pay more for such Products.~~

~~113. The promotion of natural ingredients deceives consumers.~~
~~65.~~104. The value of the Product that plaintiffs~~s~~ purchased and consumed was materially less than its value as represented by defendant.

~~66.~~105. _____ Had plaintiff~~s~~ and class members known the truth, they would not have bought the Products or would have paid less for it.

~~114. The Product contains other representations which are misleading and deceptive.~~

~~67.~~106. _____ As a result of the false and misleading labeling, the ~~Product is~~Products are sold at ~~a~~ premium price~~s~~, approximately no less than \$~~34.~~34.89 per ~~unit~~8 OZ box (1 OZ packets) and \$5.49 per 10 OZ tin, excluding tax, compared to other similar products represented in a non-misleading way.

Jurisdiction and Venue

~~68.~~107. _____ Jurisdiction is proper pursuant to 28 U.S.C. § 1332(d)(2) (Class Action Fairness Act of 2005 or “CAFA”).

~~69.~~108. _____ Under CAFA, district courts have “original federal jurisdiction over class actions involving (1) an aggregate amount in controversy of at least \$5,000,000; and (2) minimal diversity[.]” *Gold v. New York Life Ins. Co.*, 730 F.3d 137, 141 (2d Cir. 2013).

~~121. Upon information and belief, the aggregate amount in controversy is more than \$5,000,000.00, exclusive of interests and costs.~~

109. Plaintiff Ryan Cosgrove is a citizen of New York.

~~70.~~110. _____ Plaintiff Amanda Crout is a citizen of New York.

~~71.~~111. _____ Defendant is a Oregon corporation with a principal place of business in Seattle, King County, Washington and is a citizen of Washington.

~~County, Oregon and is a citizen of Oregon.~~

112. Venue is proper because plaintiff Cosgrove and many class members reside in this District and defendant does business in this District and State.

~~72.113.~~ This court has personal jurisdiction over defendant because it conducts and transacts business, contracts to ~~provide and/or supply and provides and/or supplies services and/or~~ goods within New York.

~~122. Venue is proper because plaintiff and many class members reside in this District and defendant does business in this District and State.~~

~~73.114.~~ A substantial part of events and omissions giving rise to the claims occurred in this District.

~~District.~~

Parties

~~74.115.~~ Plaintiff Ryan Cosgrove is a citizen of ~~New York~~Bronx, Bronx County, New York.²⁷

116. Plaintiff Amanda Crout is a citizen of Brooklyn, Kings County, New York.

~~75.117.~~ Defendant Oregon Chai, Inc. is a Oregon corporation with a principal place of business in Seattle, ~~Oregon~~Washington, King County.

~~129.~~ During the relevant statutes of limitations, plaintiff~~s~~ purchased the Product~~s~~ within ~~this~~

~~76.118.~~ ~~district~~their districts and/or State~~s~~ for personal consumption and/or use in reliance on the representations the Products vanilla taste was only from real vanilla.

119. Plaintiff Cosgrove purchased the Vanilla Chai Products in boxes of 1 OZ packets at Stop & Shop Supermarket, 5716 Broadway, Bronx, New York 10463, on multiple occasions in the end of 2018 and in the beginning of 2019.

120. Plaintiff Cosgrove bought the Products because she liked chai, expected the vanilla flavor to only come from real vanilla beans because the front label lacked any reference to the

²⁷ ~~The complaint originally filed misstated plaintiff's citizenship (New York) and residence, in Bronx County.~~

Products being “flavored,” thought that the Products would contain more vanilla than its other flavoring components, did not state it contained vanillin, an artificial flavor when used with vanilla and she believed it only contained natural ingredients.

121. Plaintiff Crout purchased the Vanilla Chai Products in the tin of 10 OZ at Target, 139 Flatbush Ave, Brooklyn, New York 11217 in the first half of 2019 and in the box of 1 OZ packets at Stop & Shop Supermarket, 625 Atlantic Ave, Brooklyn, New York 11217 in the middle of July 2019.

122. Plaintiff Crout bought the Products because she liked chai, expected the vanilla flavor to only come from real vanilla beans because the front label lacked any reference to the Products being “flavored,” thought that the Products would contain more vanilla than its other flavoring components, did not state it contained vanillin, an artificial flavor when used with vanilla and she believed it only contained natural ingredients

123. Plaintiff Cosgrove and Plaintiff Crout would buy the Vanilla Chai Products in a box or tin again if they were assured the vanilla flavor in the Products was only from real vanilla and did not come from non-vanilla sources and was only made with natural ingredients.

Class Allegations

~~77.~~124._____The class~~es~~ will consist of all purchasers of the ~~Products~~Vanilla Chai 8 OZ boxes (1 OZ packets) and 10 OZ tins in New York,~~the other 49 states and a nationwide class,~~ during the applicable statutes of limitations.

~~78.~~125._____Common questions of law or fact predominate and include whether ~~defendant’s~~ representations were and are misleading and if plaintiff~~s~~ and class members are entitled to damages.

79.126. _____ Plaintiff~~s~~' claims and basis for relief are typical to other members because all were subjected to the same unfair and deceptive representations and actions.

80.127. _____ ~~Plaintiff is an~~ Plaintiffs are adequate representatives because ~~their~~ interests do not conflict with other members.

81.128. _____ No individual inquiry is necessary since the focus is only on defendant's practices and the class is definable and ascertainable.

82.129. _____ Individual actions would risk inconsistent results, be repetitive and are impractical to justify, as the claims are modest relative to the scope of the harm.

83.130. _____ Plaintiff~~s~~' counsel is competent and experienced in complex class action litigation and intends to adequately and fairly protect class members' interests.

84.131. _____ ~~Plaintiff seeks~~ Plaintiffs seek class-wide injunctive relief because the practices continue.

New York ~~General Business Law~~ ("GBL") §§ 349 & 350

(Consumer Protection from Deceptive Acts)

85.132. _____ ~~Plaintiff incorporates~~ Plaintiffs incorporate by reference all preceding paragraphs.

86.133. _____ Plaintiff~~s~~ and class members desired to purchase, consume and use products or services which were as described and marketed by defendant and expected by reasonable consumers, given the product or service type.

87.134. _____ Defendant's acts and omissions are not unique to the parties and have a broader impact on the public.

88.135. _____ Defendant misrepresented the substantive, quality, compositional, organoleptic and/or nutritional attributes of the Products.

~~89.~~136. Defendant's conduct was misleading, deceptive, unlawful, fraudulent, and unfair because it gives the false impression to consumers that (1) the Products contain sufficient amounts of the highlighted ingredient, more vanilla, ~~to independently characterize the taste or flavor of~~ than honey, (2) the Products, ~~did not~~ contain ~~other flavor components which simulate, resemble or reinforce the characterizing flavor and only contained flavor from~~ more vanilla than cinnamon, (3) the vanilla flavor in the Products is only provided by vanilla beans because the "vanilla" statements are not qualified, (4) the Products do not contain artificial flavors such as vanillin to boost or spike a trace of vanilla and (5) the Products contain only natural ingredients.

137. Plaintiff Plaintiffs relied on the statements, omissions and representations of defendant, and defendant knew or should have known the falsity of the same.

~~90.~~138. Plaintiffs and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Negligent Misrepresentation

~~91.~~139. ~~Plaintiff incorporates~~ Plaintiffs incorporate by reference all preceding paragraphs.

~~92.~~140. Defendant misrepresented the substantive, quality, compositional, organoleptic and/or nutritional attributes of the Products.

~~93.~~141. Defendant's conduct was misleading, deceptive, unlawful, fraudulent, and unfair because it gives the false impression to consumers that (1) the Products contain sufficient amounts of the highlighted ingredient, more vanilla, ~~to independently characterize the taste or flavor of~~ than honey, (2) the Products, ~~did not~~ contain ~~other flavor components which simulate, resemble or reinforce the characterizing flavor and only contained flavor from~~ more vanilla than cinnamon, (3) the vanilla flavor in the Products is only provided by vanilla beans because the

“vanilla” statements are not qualified, (4) the Products do not contain artificial flavors such as vanillin to boost or spike a trace of vanilla and (5) the Products contain only natural ingredients.

94.142. Defendant had a duty to disclose and/or provide non-deceptive marketing of the Products and knew or should have known same were false or misleading.

95.143. This duty is based on defendant’s position as an entity which has held itself out as having special knowledge and experience in the production, service and/or sale of the product or service type.

96.144. The representations took advantage of ~~consumers’~~ (1)consumers’ cognitive shortcuts made at the point-of-sale and ~~(2)their~~ trust ~~placed~~ in defendant, a well-known and respected brand or entity in this sector.

97.145. Plaintiff~~s~~ and class members reasonably and justifiably relied on these negligent misrepresentations and omissions, which served to induce and did induce, the purchase of the Products.

98.146. Plaintiff~~s~~ and class members would not have purchased the Product~~s~~ or paid as much if the true facts had been known, suffering damages.

Breaches of Express Warranty, Implied Warranty of Merchantability and Magnuson Moss Warranty Act, 15 U.S.C. §§ 2301, et seq.

99.147. ~~Plaintiff incorporates~~ Plaintiffs incorporate by reference all preceding paragraphs.

100.148. The Products were manufactured, labeled and sold by defendant and warranted to ~~plaintiff and class members that they possessed~~ plaintiffs and substantive, functional, nutritional, qualitative, compositional, organoleptic, sensory, physical and other attributes which they did not.

149. Defendant's conduct was misleading, deceptive, unlawful, fraudulent, and unfair because it gives the false impression to consumers that (1) the Products contain more vanilla than honey, (2) the Products contain more vanilla than cinnamon, (3) the vanilla flavor in the Products is only provided by Products do not contain artificial flavors such as vanillin to boost or spike a trace of vanilla and (5) the Products contain only natural ingredients.

~~101.~~150. Defendant had a duty to disclose and/or provide non-deceptive descriptions and marketing of the Products.

~~102.~~151. This duty is based, in part, on defendant's position as one of the most recognized companies in the nation in this sector.

~~companies in the nation in this sector.~~

~~103.~~152. ~~Plaintiff~~Plaintiffs provided or will provide notice to defendant, its agents, representatives, retailers and their employees.

~~104.~~153. Defendant received notice and should have been aware of these misrepresentations due to numerous complaints by consumers to its main office over the past several years regarding this issue.

~~105.~~154. The Products did not conform to their affirmations of fact and promises due to defendant's actions and were not merchantable.

~~106.~~155. ~~Plaintiff~~s and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Fraud

156. ~~Plaintiff incorporates by references~~Plaintiffs incorporate by reference all preceding paragraphs.

157. Defendant's conduct was misleading, deceptive, unlawful, fraudulent, and unfair because it gives the false impression to consumers that (1) the Products contain sufficient amounts of the highlighted ingredient, more vanilla, ~~to independently characterize the taste or flavor of~~ than honey, (2) the Products, did not contain ~~other flavor components which simulate, resemble or reinforce the characterizing flavor and only contained flavor from~~ more vanilla than cinnamon, (3) the vanilla flavor in the Products only provided by vanilla beans because the "vanilla" statements are not qualified, (4) the Products do not contain artificial flavors such as vanillin to boost or spike a trace of vanilla and (5) the Products contain only natural ingredients.

158. Defendant's fraudulent intent is evinced by its failure to accurately identify the Products on the front labels, when it knew ~~this was not~~ its statements were neither true nor accurate.

159. Plaintiffs and class members would not have purchased the Products or paid as much if the true facts had been known, suffering damages.

Unjust Enrichment

160. ~~Plaintiff incorporates~~ Plaintiffs incorporate by reference all preceding paragraphs.

161. Defendant obtained benefits and monies because the Products were not as represented and expected, to the detriment and impoverishment of plaintiffs and class members, who seek restitution and disgorgement of inequitably obtained profits.

Jury Demand and Prayer for Relief

~~Plaintiff demands a jury trial on all issues.~~

Plaintiffs demand a jury trial on all issues.

WHEREFORE, ~~Plaintiff prays~~ Plaintiffs pray for judgment:

1. Declaring this a proper class action, certifying plaintiffs as representatives and undersigned as counsel for the class;

2. Entering preliminary and permanent injunctive relief by directing defendant to correct the

challenged practices to comply with the law;

3. Injunctive relief to remove, correct and/or refrain from the challenged practices and representations, restitution and disgorgement for members of the State Subclasses pursuant to the applicable laws of their States;

4. Awarding monetary damages and interest, ~~including treble and punitive damages,~~ pursuant to the common law and other statutory claims;

5. Awarding costs and expenses, including reasonable fees for plaintiffs' attorneys and experts; and

6. Other and further relief as the Court deems just and proper.

Dated: ~~February 20~~April 2, 2020

Respectfully submitted,

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